

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

WAYNE FORAKER,	)	
	)	
Claimant-Below, Appellant,	)	
	)	
v.	)	C.A. No. N21A-07-002 JRJ
	)	
AMAZON.COM, INC.,	)	
	)	
Employer-Below, Appellee.	)	
	)	

**MEMORANDUM OPINION**

Submitted: November 5, 2021

Decided: February 9, 2022

*Upon Wayne Foraker's Appeal of the Industrial Accident Board's Order on  
Remand: **DENIED.***

Craig T. Eliassen, Esq., Schmittinger and Rodriguez, P.A., 414 S. State Street, P.O. Box 497, Dover, DE 19903-0497, Attorney for Claimant-Below, Appellant.

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**Jurden, P.J.**

## I. INTRODUCTION

This is an appeal of the Industrial Accident Board's Order on Remand filed by Claimant Wayne Foraker ("Claimant"). The Order on Remand was issued in response and pursuant to the Superior Court's Memorandum Opinion reversing and remanding the Board's November 18, 2019, decision ("Board Decision") denying Claimant's Petition to Determine Additional Compensation Due ("Petition"). For the reasons explained below, the Board's Order on Remand is **AFFIRMED**.

## II. PROCEDURAL HISTORY

Claimant sustained a work injury on March 28, 2018, while working for Amazon.com, Inc. ("Employer").<sup>1</sup> Employer acknowledged the occurrence of a low back sprain and paid a limited period of total disability from March 29, 2018, to September 18, 2018.<sup>2</sup> Following the expiration of total disability compensation, Claimant filed the Petition, alleging a recurrence of total disability and requesting additional medical bill payment from September 18, 2018 and ongoing.<sup>3</sup> The Employer disputed the Petition, asserting that the work-related injury was limited to a lower back strain and that any ongoing pain was attributable to prior back injuries

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<sup>1</sup> Appellant's Opening Brief on Appeal of the Industrial Accident Board's Decision Dated June 17, 2021 ("Op. Br.") (Trans. ID. 66933311), at 3.

<sup>2</sup> Appellee's Answering Brief on Appeal of the Industrial Accident Board's Decision Dated June 17, 2021 ("Ans. Br.") (Trans. ID. 67009003), at 1.

<sup>3</sup> *Id.*

sustained by Claimant in 1993 and 1994.<sup>4</sup> The Board held a hearing on Claimant's Petition and after reviewing the evidence presented, determined that Claimant's work-related injury resolved and therefore rejected the claim.<sup>5</sup> Claimant appealed the Board Decision to the Superior Court.<sup>6</sup> The Court reversed and remanded the case to the Board, holding:

. . . this Court hereby finds that the [Board] committed legal error in its denial of additional workers' compensation from September 19, 2018. In addition, the record does not include substantial evidence to support the [Board]'s findings of fact that Foraker's Amazon injury had completely resolved as of April 24, 2019, and that any injury Foraker continued to suffer was due to a prior injury.<sup>7</sup>

On remand, the Board denied the Petition.<sup>8</sup> In response, Claimant filed the instant appeal.

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<sup>4</sup> Board Decision dated November 18, 2019, at 2-3.

<sup>5</sup> *Id.* at 20.

<sup>6</sup> Ans. Br. at 2.

<sup>7</sup> *Foraker v. Amazon.com, Inc.*, 2020 WL 6503589, at \*8 (Del. Super. Nov. 5, 2020). Following the Superior Court's decision, Employer filed a Motion for Clarification with the Court asking the Court to clarify whether it was the Court's intention to reverse the Petition denial in full, or whether the Board still had discretion to weigh the evidence and determine the nature and extent of the work injury. Appellee's Motion for Reargument-Clarification (Trans. ID. 66127677). Employer also filed an Application Interlocutory Appeal. Application for Certification of Interlocutory Appeal (Trans. ID. 66201645). Both were denied by the Court. Order Denying Amazon's Motion for Reargument-Clarification (Trans. ID. 66178411); Order Denying Amazon's Application for Certification of Interlocutory Appeal (Trans. ID. 66223744).

<sup>8</sup> Board Order on Remand dated June 17, 2021, at 1.

### III. STATEMENT OF FACTS

The Board held its first hearing on the merits regarding this claim on October 23, 2019.<sup>9</sup> Claimant testified on his own behalf and provided the deposition testimony of his treating physician and expert witness, Dr. Zaslavsky, who was deposed on October 8, 2019. Claimant testified that he was putting things away in a drawer at work when he stood up and felt a sharp pain in his back.<sup>10</sup> He reported the incident to his manager on the same day; no radiating leg pain was mentioned and Claimant stated that he did not experience any at that time.<sup>11</sup> The next day, however, Claimant visited Work Pro and indicated that he did not know why the previous day's medical report showed a denial of pain other than to his low back.<sup>12</sup> Claimant testified that he sustained previous lower back injuries in 1993 and 1994, resulting in a disc herniation, and had to undergo surgery in 1995 following a reaggravation of pain.<sup>13</sup> Following this surgery, in 1997, Claimant signed an injury benefit agreement in which he acknowledged the permanency of the injuries sustained to his low back and left leg.<sup>14</sup> Although

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<sup>9</sup> Ans. Br. at 5 (*citing* Transcript of 10/23/19 Hrg. ("10/23/19 Hrg.")).

<sup>10</sup> 10/23/19 Hrg. at 25: 11-14.

<sup>11</sup> *Id.* at 25: 16-19; 41: 24-25 to 42:1.

<sup>12</sup> *Id.* at 43: 3-5.

<sup>13</sup> *Id.* at 34: 5-8.

<sup>14</sup> *Id.* at 38: 10-25.

Claimant agreed the injuries were permanent, he testified at the Board hearing that he was symptom-free from 1997 until the 2018 work-related injury.<sup>15</sup>

Dr. Zaslavsky first examined Claimant on May 1, 2018. Claimant reported immediate onset of back pain with radiating symptoms in his leg.<sup>16</sup> Dr. Zaslavsky testified that he has had former patients who underwent surgery, like a microdiscectomy, who later experienced flareups and progressions of degenerative disc disease that could occur without any new triggering event.<sup>17</sup>

Employer presented the deposition testimony of Dr. Kahanovitz, an orthopedic surgeon, and Jared Ingersoll, its safety specialist. Dr. Kahanovitz testified that he examined Claimant on two separate occasions following the date of injury.<sup>18</sup> Regarding his first examination, Dr. Kahanovitz testified that the mechanism of injury (i.e., standing up after bending down) was fairly minor.<sup>19</sup> He found normal curvatures of Claimant's spine in his physical examination and noted that there was no pain palpitation throughout the lumbar midline or left-sided paraspinal muscles, and no radiating pain to the lower extremities.<sup>20</sup> Dr. Kahanovitz concluded that Claimant sustained no more than a lumbar strain on March 28, 2018, and testified that the results of an MRI performed on Claimant following the

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<sup>15</sup> *Id.* at 34: 9-12.

<sup>16</sup> Deposition Transcript of Dr. Zaslavsky ("Zaslavsky Tr.") at 48: 2-6.

<sup>17</sup> *Id.* at 42: 11-23.

<sup>18</sup> Deposition Transcript of Dr. Kahanovitz ("Kahanovitz Tr.") at 4: 20-24.

<sup>19</sup> *Id.* at 8: 15-17.

<sup>20</sup> *Id.* at 10: 6-12.

incident, which showed diffuse degenerative disease above the L5-S1 level of his spine, supported this conclusion.<sup>21</sup> Regarding the second examination, Dr. Kahanovitz noted normal curvatures of the spine and unchanged extremity symptoms, and also found that a neurological exam performed on Claimant negated any finding of lumbar radiculopathy - a range of symptoms produced by the pinching of a nerve root in the spinal column.<sup>22</sup> Dr. Kahanovitz again concluded that Claimant's work injury was limited to a lower back sprain.<sup>23</sup>

Jared Ingersoll testified that he reviewed Claimant's Associate First Injury Report<sup>24</sup> and confirmed that Claimant only reported low back pain immediately following the injury; no left leg symptoms were mentioned.<sup>25</sup>

#### **IV. PARTIES' CONTENTIONS**

Claimant contends that the Superior Court remanded the case to the Board for an award of ongoing temporary total disability benefits.<sup>26</sup> Claimant further argues that the Court held there was no record evidence to support an inference contrary to

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<sup>21</sup> *Id.* at 9: 2-7.

<sup>22</sup> *Id.* at 14: 19-24; 15: 1-9; 16: 8-24.

<sup>23</sup> *Id.* at 17: 16-19.

<sup>24</sup> 10/23/19 Hrg. at 76: 9-25; 77: 1-15.

<sup>25</sup> 10/23/19 Hrg. at 76: 9-20; 80: 2-6.

<sup>26</sup> Op. Br. at 9. "The Superior Court could not have been clearer; this case was remanded to the [Board] for an award of ongoing temporary total disability benefits. The matter was remanded for such an award and to consider attorney's fees and medical witness fees that fall within the Board's discretion by statute." *Id.*

a finding that Claimant's disability is from the recent accident, rather than the previous injury.<sup>27</sup> Claimant argues that the Board again failed to support their denial of Claimant's Petition with substantial evidence.<sup>28</sup> Claimant argues that the Board rejected Claimant's uncontradicted testimony a second time and contends that the only major difference is the Board's additional reliance on the case of *Steppi v. Conti Electric, Inc.*<sup>29</sup> Claimant maintains the Court should reverse and remand the Order on Remand and expressly instruct the Board to award temporary total disability benefits from September 19, 2018 and continuing.<sup>30</sup>

In response, Employer disputes Claimant's interpretation of the Memorandum Opinion and subsequent orders and argues instead that the Court was directing the Board to apply the proper legal standard to the facts of the case.<sup>31</sup> Employer further argues that the Order on Remand was properly supported by substantial evidence.<sup>32</sup>

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<sup>27</sup> *Id.* at 10.

<sup>28</sup> Op. Br. at 14.

<sup>29</sup> *Id.* at 13. In *Steppi*, the Board awarded compensation to claimant after finding he was injured due to a gas exposure. The Board's decision was partly based on a finding that the gas sensor at claimant's place of work was malfunctioning and potentially failed to detect a gas leak. This finding had little to no support in the record, as there was only uncontradicted testimony that the gas sensor was overly sensitive (i.e. it would sometimes indicate a gas leak when there was not one, but it never failed to detect an actual leak). The Superior Court reversed the Board's decision, but the Supreme Court affirmed the Board on appeal. The Supreme Court explained that the Board could have found that the sensors were only over sensitive, but the evidence in the record taken as a whole allowed them to conclude that it was malfunctioning more generally. *Steppi v. Conti Elec., Inc.*, 991 A.2d 19, at \*3 (Del. 2010)). Here, even though Claimant's testimony was uncontradicted, the evidence in the record as a whole permitted the Board to find that it was not credible.

<sup>30</sup> Op. Br. at 13-14.

<sup>31</sup> Ans. Br. at 22.

<sup>32</sup> Ans. Br. at 12.

According to Employer the Claimant's testimony was properly found not credible in light of the other evidence presented, including the expert testimony.<sup>33</sup> For example, Employer notes that Claimant had a "prior baseline condition of back problems" due to his past injuries in 1993 and 1994.<sup>34</sup> Employer points out that Claimant, after receiving surgery, was found in 1997 to have a permanent injury to his lower back and consequently received permanent impairment benefits for his low back and left leg, the same locations his current symptoms are manifesting.<sup>35</sup> Even though Claimant frequently complained of left leg pain in the months following the date of injury, the initial records indicate that Claimant only complained of lower back pain without radiating symptoms to the legs.<sup>36</sup> Regarding the Board's credibility determinations, Employer argues that the Board is free to accept one expert's opinion over another when they are in conflict, and that such acceptance "constitutes substantial evidence for the purpose of appellate review."<sup>37</sup>

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<sup>33</sup> *Id.* at 18.

<sup>34</sup> *Id.* (citing 10/23/19 Hrg. at 37: 20-24).

<sup>35</sup> Ans. Br. at 13 (citing 10/23/19 Hrg. at 38: 10-25).

<sup>36</sup> Ans. Br. at 13 (citing Kahanovitz Tr. at 50: 10-12).

<sup>37</sup> Ans. Br. at 14-15 (citing *Seweny v. Wal-Mart*, 2013 WL 3975149, at \*4 (Del. Super. Ct. July 31, 2013); see also *Kelley v. Christiana Care Health Servs.*, R, 2006 WL 515457, Del. Supr. 2006), *aff'd*, 903 A.2d 323 (Del. 2006); *Waples v. State*, 2004 WL 2828279, (Del. Supr. 2004), *aff'd*, 858 A.2d 961 (Del. 2004); *Goicuria v. Kauffman's Furniture*, 706 A.2d 26 (Del. 1998) at 4-5).



## V. STANDARD OF REVIEW

In considering an appeal of a Board decision, The Court does not sit as a trier of fact with authority to “weigh the evidence, determine questions of credibility, or make its own factual findings.”<sup>38</sup> Rather, the Court’s role is limited to “an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board’s findings of fact and conclusions of law.”<sup>39</sup> In reviewing the Board’s decision, the Court must give deference to the “experience and specialized competence of the Board”<sup>40</sup> and must take into account the purposes of the Worker’s Compensation Act.<sup>41</sup> These restrictions are in part due to the “critical advantage” the Board has in its ability to observe the testimony of the live witnesses.<sup>42</sup> Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>43</sup> It is less than a

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<sup>38</sup> *Powell v. OTAC, Inc.*, 223 A.3d 864, 870 (Del. 2019) (internal quotations omitted) (quoting *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)).

<sup>39</sup> *Powell*, 223 A.3d at 870 (internal quotations omitted) (quoting *Roos Foods v. Guardado*, 152 A.3d 114, 118 (Del. 2016)).

<sup>40</sup> There is a presumption in favor of validity of the Board’s decision and the burden of showing the error rests with the party raising the objection to such decision. *Phoenix Steel Corp. v. Garton*, 1980 WL 687396, at \*2 (Del. Supr. 1980). If there is evidence in the record that allows for the conclusions of the Board to be fairly and reasonably drawn, the Court will not disturb the findings of the Board. *Asplundh Tree Expert Co. v. Clark*, 369 A.2d 1084, 1089 (Del. Supr. 1975). In reviewing the records, the Court will apply the facts most favorably to the prevailing party below. *Branum v. Franklin Co.*, 1993 WL 489383, at \*2 (Del. Supr. 1993).

<sup>41</sup> *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

<sup>42</sup> *Butler v. Speakman Co.*, 1992 WL 276449, at \*2 (Del. 1992).

<sup>43</sup> *Washington v. Del. Transit Corp.*, 226 A.3d 202, 210 (Del. 2020) (internal quotation marks omitted) (quoting *Powell v. OTAC, Inc.*, 2019 WL 6521980, at \*4 (Del. Dec. 4, 2019)).

preponderance of the evidence but more than a “mere scintilla.”<sup>44</sup> In the absence of legal error, “the standard of review for a Board’s decision is abuse of discretion.”<sup>45</sup> “The Board has abused its discretion only when its decision has ‘exceeded the bounds of reason in view of the circumstances.’”<sup>46</sup>

## VI. DISCUSSION

### A. The Memorandum Opinion Reversing and Remanding

The Court reversed and remanded because the Board “failed to reference *any* evidence within the record” as to why it “[did] not find it credible that Claimant had no trouble or symptoms related to his prior accident or surgery.”<sup>47</sup> As the Court noted in its Memorandum Opinion:

Under the *Lemmon* framework, a rejection of [Claimant’s] credibility by the [Board] must specifically reference record evidence that led to the rejection of [Claimant’s] uncontradicted testimony. The [Board] failed to reference *any* evidence within the record.<sup>48</sup>

The Board’s interpretation that the Court in its Memorandum Opinion “laid out deficiencies” in the original order which the Board then had an opportunity to remedy on remand is correct.<sup>49</sup>

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<sup>44</sup> *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005) (citations omitted).

<sup>45</sup> *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

<sup>46</sup> *Id.*

<sup>47</sup> *Foraker*, 2020 WL 6503589 at \*7 (citing Board Decision dated November 18, 2019, at 19).

<sup>48</sup> *Id.*

<sup>49</sup> Order on Remand at 3.

**B. The Board’s Order on Remand Finding that Claimant Failed to Prove his Ongoing Problems were Related to the March 2018 Work Accident is Supported by Substantial Evidence.**

As noted above, substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>50</sup> Because the Board “has expressly been entrusted with the power to find the facts, its fact finding must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way.”<sup>51</sup>

In its Order on Remand, the Board reached the same conclusion it did in its original Decision. Unlike in its original Decision, however, on remand the Board specifically referenced the record evidence it relied upon in determining Claimant’s testimony that his previous injury had resolved prior to September 19, 2018 was not credible, and that Employer’s expert, Dr. Kahanovitz, was more credible than Claimant’s treating physician and expert, Dr. Zaslavsky.<sup>52</sup> The Board detailed the evidence in the record it relied upon to determine Claimant only suffered a minor back sprain in the workplace accident.<sup>53</sup> It relied on the opinion of Dr. Kahanovitz

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<sup>50</sup> *Washington v. Del. Transit Corp.*, 226 A.3d 202, 210 (Del. 2020) (internal quotation marks omitted) (quoting *Powell v. OTAC, Inc.*, 2019 WL 6521980, at \*4 (Del. Dec. 4, 2019)).

<sup>51</sup> *Steppi*, 991 A.2d at 3 (citing 8 Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* § 130.01[3] (2009)).

<sup>52</sup> Order on Remand at 1. It is well-settled Delaware Law that “the Board ‘may adopt the opinion testimony of one expert over another; and that opinion, if adopted, will constitute substantial evidence for purposes of appellate review.’” *Heglund*, 151 A.3d at 3 (citing *Person-Gaines v. Pepco Holdings*, 981 A.2d 1159, 1161 (Del. 2009)).

<sup>53</sup> *Id.* at 3-5.

who concluded that Claimant had a very limited injury that was causally related to his employment and that that injury was resolved.<sup>54</sup> The Board's reliance on this opinion was based on Dr. Kahanovitz's testimony that 1.) the mechanism of injury was minor, 2.) the medical record did not support an aggravation of Claimant's pre-existing back injuries as opined by Dr. Zaslavsky, 3.) his physical examination of Claimant did not show any nerve damage or ongoing chronic neurological symptoms other than a complaint of back pain, and 4.) the neurological testing was normal with negative findings for radiculopathy, which was inconsistent with Dr. Zaslavsky's findings but supported by the benign MRI results.<sup>55</sup> Dr. Kahanovitz also relied on the MRI findings showing no compression of the nerve roots to refute Dr. Zaslavsky's concern for lumbar radiculopathy.<sup>56</sup>

The Board also cited Dr. Kahanovitz's review of Claimant's medical records as further support for its conclusion. The initial medical record from Employer's health clinic reports that Claimant had a history of prior back surgery and that his pain following the present injury was similar but not as bad as it was at the time of the surgery.<sup>57</sup> At Workpro the day after the injury, Claimant denied any radiating pain or numbness and tingling in his legs, and it was noted that he was in no acute

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<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Id.* at 4.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 5.

distress.<sup>58</sup> Based on the findings of the clinical examinations and Dr. Kahanovitz's examinations and testimony, combined with the lack of correlating data on the diagnostic studies, the Board concluded that Claimant suffered a minor injury because of the work incident.<sup>59</sup>

The Board on remand has cited to specific facts in the record supporting its finding that the Claimant's testimony was not credible, and claimant failed to prove he is unable to work and has ongoing problems related to the work injury.<sup>60</sup> The Board cured the deficiency noted by the Court by providing a detailed explanation, based on record evidence, for dismissing the Claimant's uncontradicted testimony. The Order on Remand makes clear that this pivotal credibility determination was premised on the testimony of Dr. Kahanovitz, the medical record, Claimant's inconsistent reports to providers regarding pain in the left leg, and Claimant's past receipt of workers compensation based on the permanence of his prior back injuries.<sup>61</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> Order on Remand at 5.

<sup>60</sup> *Id.* at 3-6 (*see* Ans. Br. at 12-18).

<sup>61</sup> *Id.* at 5-6.

## **VII. CONCLUSION**

Based on the foregoing, the Court is now satisfied that there is substantial evidence in the record to support the Board's findings of fact and conclusions of law and there is no legal error. Accordingly, the Board's Order on Remand is **AFFIRMED.**

**IT IS SO ORDERED.**

/s/ Jan R. Jurden  
Jan R. Jurden, President Judge

cc: Prothonotary